

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JAMES KIDD</b>	)	
Claimant	)	
VS.	)	
	)	
<b>MONFORT, INC.</b>	)	Docket No. 157,072
Respondent	)	
Self-Insured	)	

**ORDER**

This case involves a dispute over attorney fees. Attorney Robert A. Levy, claimant's former attorney, appeals the September 19, 2000, Order of Administrative Law Judge Pamela J. Fuller. In the Order, Levy was granted an additional \$2,046.28 for expenses, but denied additional fees. The Board held oral argument on May 11, 2001.

**APPEARANCES**

Claimant's present counsel Gary E. Patterson (Patterson) of Wichita, Kansas, and claimant's former counsel Robert A. Levy (Levy) of Garden City, Kansas, participated in oral argument before the Appeals Board.

**ISSUES**

- (1) Did Levy acquiesce to the Order of Administrative Law Judge Fuller after accepting payment of the \$2,046.28 and cashing said check alleged as full and final satisfaction of his lien pursuant to the Judge's Order?
- (2) If not, what is an appropriate division of attorney fees between Levy and Patterson?
- (3) Should this matter be remanded to the Administrative Law Judge for additional evidence regarding the amount of time spent by Patterson in representing claimant in this matter?
- (4) Can Levy amend his attorney fee lien after settlement of the claim?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file filed herein, the Appeals Board remands this matter back to the Administrative Law Judge for taking of additional evidence regarding the amount of time spent by Patterson in the representation of claimant in his claim against Monfort, Inc.

Levy began representing claimant in his claim against Monfort, Inc., in 1991. That representation continued until claimant terminated the contract with Levy in 1998. Patterson then entered his appearance as claimant's attorney and continued the matter through the final settlement of the claim on August 1, 2000.

Levy filed an attorney's lien against any monies which may be awarded to the claimant and his attorney. In her Order of September 19, 2000, Administrative Law Judge Fuller awarded Levy "an additional \$2,046.28 for expenses in the above captioned case."

Patterson then forwarded to Levy a check in the amount of \$2,046.28 with a cover letter stating "which is tendered as full and final satisfaction of your lien pursuant to the judge's order." However, the check from Patterson to Levy had noted in the memo section that it was for "James Kidd expenses."

It is clear from both the name on the check and the language of the Order of the Administrative Law Judge that the \$2,046.28 was intended to cover Levy's expenses. There is no indication in either of the documents that this would foreclose Levy's lien and claim for additional attorney fees from the permanent disability awarded claimant at the time of the settlement hearing. The only document which purports to identify this amount as full and final satisfaction of Levy's lien is the September 21, 2000, transmittal letter from Patterson.

Where a judgment or decree involves distinct and severable matters, demands or issues, an acceptance of the burdens or benefits of one or more parts thereof will not prevent an appeal as to the remaining contested matters, demands or issues. Brown v. Combined Ins. Co. of America, 226 Kan. 223, 597 P.2d 1080, Syl. 7 (1979); McDaniel v. Jones, 235 Kan. 93, 679 P.2d 682 (1984).

The Appeals Board finds the decision by Levy to cash the check does not constitute acquiescence in the dispute regarding his claim for attorney fees for his representation of claimant in this matter.

The Workers Compensation Act provides that all disputes regarding attorneys fees shall be decided by the Administrative Law Judge pursuant to K.S.A. 44-536(h). When

considering the division of attorney fees, the matter should be considered on a case-by-case basis after considering all relevant factors. Some of those factors, as listed in K.S.A. 1990 Supp. 44-536(b), include:

- (1) The offers of settlement made prior to litigation;
- (2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- (3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;
- (4) the fee customarily charged in the locality for similar legal services;
- (5) the amount of compensation involved and the results obtained;
- (6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;
- (7) the nature and length of the professional relationship with the employee or the employee's dependents; and
- (8) the experience, reputation and ability of the attorney or attorneys performing the services.

When resolving disputes under K.S.A. 44-536(h), the director of workers compensation has the power and discretion to apportion fees. However, he must exercise such power and discretion in a reasonable and proper manner, considering the particular circumstances of each case. Madison v. Goodyear Tire & Rubber Co., 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

In Madison, more than enough fees existed to cover both attorneys' claims. That may not be the case here.

The Board finds that, in order to fully determine the reasonableness of the fees dispute, a breakdown of the time expended by both Levy and Patterson and any funds collected as fees during the litigation of this matter during their representation of claimant is required. Any fees awarded to Levy must be based on quantum meruit. The collection of fees from the payment of temporary total disability must also be considered. In order to properly determine the amount of that quantum meruit fee, the record must reflect the total time and effort expended by the two attorneys as they advanced the claimant's claim

for compensation. See Burroughs v. IBP, Inc., WCAB Docket No. 170,497 (September 2000).

The issue dealing with Levy's attempt to amend his lien after the settlement of the claim was not decided by the Administrative Law Judge. The Board will not take jurisdiction of issues raised for the first time on appeal. Robinson v. Stone Masons, Inc., WCAB Docket No. 205,004 (April 1999). This issue is remanded to the Administrative Law Judge for consideration.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that this matter be remanded to Administrative Law Judge Pamela J. Fuller for further proceedings to determine the amount of time expended by Patterson and Levy in the representation of claimant in this matter and the amount of fees due each, and for further orders consistent with this opinion.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gary E. Patterson, Attorney for Claimant  
Robert A. Levy, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director